

DERTF/Feb 99

SURVEY ON STATE EXPERIENCE WITH INSTITUTIONAL CONTROLS

(Work in Progress)
By Thomas H. Edwards
Assistant Attorney General
State of Texas

States Responding

- [California](#)
- [Colorado](#)
- [North Carolina](#)
- [Ohio](#)
- [Texas](#)
- [Utah](#)
- [Washington](#)

These answers do not constitute an admission, or the opinion of any state attorney general, or the position of the National Association of Attorneys General, any state, or any state agency. All rights, claims, and defenses are reserved.

2 Consult the notes for the text of the Q & A.

Experience of Respondents

- **Average 13 years Environmental Law**
- **Average 7 years Real Property Law**

3

QUESTION # 23: Please describe (briefly) your experience in environmental law.

CAL: This survey was completed by 2 attorneys in DTSC's legal office who have many years of environmental law experience.

COL: I have twelve years' experience in the Attorney General's Office representing the Hazardous Materials and Waste Management Division. I also had a fellowship with a land-use law firm in San Francisco for a year.

NC: 1 yr. w/plaintiff's atty.; 11¼ yrs. as NC state govt. atty.

TEX: Ramon Dasch: Superfund Senior Attorney at Texas Natural Resource Conservation Commission. Practicing environmental law since 1980. Areas of practice: CERCLA/Superfund, Air Quality, PST, Water, Voluntary Cleanup Program.

David Duncan: Air Quality Senior Attorney at Texas Natural Resource Conservation Commission. Practicing environmental law since 1988. Areas of practice: Air Quality, Superfund, PST, RCRA.

Parker Wilson: RCRA / Air Quality Staff Attorney at Texas Natural Resource Conservation Commission. Practicing environmental law since 1995. Areas of practice: RCRA, Federal Facilities, Air Quality.

UT: 11 years in Env. Div. of Utah AG's office.

24. Please describe (briefly) your experience in real property law.

CAL: Several years experience in real property law.

COL: Ancillary to experience in 23.

NC: OJT as dealt w/aspects of enviro law implicating real prop. law.

TEX: Ramon Dasch: Five and a half years in private sector.

UT: Little – several days research before a recent settlement.

INDIVIDUAL IC'S

Deed Notices

- Placed on deed records by landowner (or others?)
- Contain information about contaminants, concentrations, locations
- Notify public and future owners about risk; may prevent loans
- No enforceable requirements

5

15. PUBLIC NOTICES (E.g., deed notices, public registry, etc.):

a. Who can make these notices? (E.g., landowners, site operators, etc.):

CAL: *Rarely used except by military or other publicly owned property. DTSC's experience is that the owner makes the notice.*

COL: *Only the property owner can place a deed notice in the deed.*

NC: *Owner (state can if owner fails to)*

TEX: *Anyone can place a deed notice in the deed records.*

UT: *Landowners.*

b. Where are they placed?

CAL: *In the deed.*

COL: *In the deed.*

NC: *See #12.*

TEX: *Deed notices are filed in the deed records of the County Clerk's office.*

UT: *So far, on deeds only.*

Deed Notices

Notes, continued.

6

15. PUBLIC NOTICES, cont.

c. What specific information is required in identifying the risk or the prohibited activity?

CAL: *General description of the contamination and specific description of the prohibited activity(ies).*

COL: *Under § 25-15-303(4), C.R.S. (1998), the deed for any property that was used for hazardous waste disposal and that had interim status or a permit, must contain a notation that the property was so used. There is no requirement that the notice contain any information about risk. On a site-by-site basis, other notices may be negotiated as part of remedy selection and implementation.*

NC: *Known info re contaminants, their concentrations & locations.*

TEX: *Deed Notices are required to contain the following information:*

- *A certification signed by the person, showing the person's full name and title, with a statement that the closure or remediation was carried out in accordance with the appropriate risk rule.*

- *A metes and bounds description of the portion of land on which closure or remediation applies.*

- *For non-residential sites, a statement that current or future owners of the facility must undertake actions as necessary to protect human health and the environment.*

- *A statement that documents relating to the closure or remediation may be obtained from the TNRCC.*

- *Deed recordings under risk rule 3 must also include a description of any institutional or legal controls placed by the person on the future use of the property. The notice shall indicate that the current or future owner must undertake actions as necessary to protect human health and the environment in accordance with the rules of the commission.*

UT: *Case by case approved by agency.*

d. Besides notifying the public and future owners about the risk, do these notices serve any other function?

CAL: *As a practical matter, they put prospective lenders on notice (through standard lender due diligence).*

COL: *No.*

NC: *Nope.*

TEX: *No.*

UT: *Likely will prevent loans for prohibited activities.*

Deed Restrictions (Restrictive Covenants)

- **Promise between Buyer and Seller concerning use of real property**
- **May be effective without transfer of property interest**
- **May be enforceable by third parties (e.g., state agencies)**
- **Not widely tested in courts**

7

QUESTION # 16. DEED RESTRICTIONS (RESTRICTIVE COVENANTS)

a. Can these restrictions be given legal effect without the transfer of an interest in real property?

CAL: *Yes.*

COL: *It is not clear under Colorado law.*

NC: *Yes.*

TEX: *We believe the deed restrictions that are being used in the state-lead superfund, state superfund, and voluntary cleanup programs are effective against current and future owners without the transfer of an interest in real property. This, however, has yet to be tested by the courts.*

UT: *Unknown.*

WA: *Yes.*

b. By whom can these restrictions be enforced?

CAL: *By the beneficiary of the institutional control, e.g., by the State, by EPA (if the restriction so provides). Can also be enforced by the 3rd party beneficiary, if applicable.*

COL: *The holder of the covenant.*

NC: *See #6*

TEX: *The deed restrictions in their current form are drafted in favor of the TNRCC and the State of Texas. We therefore believe they are enforceable by the TNRCC and the OAG.*

UT: *Unknown.*

WA: *We assume by the Dept. of Ecology.*

Deed Restrictions (Restrictive Covenants)

Notes, continued.

8

QUESTION # 16. DEED RESTRICTIONS, cont.

c. What is the process for enforcement?

CAL: *Injunctive relief (i.e., civil suit).*

COL: *Suit for injunctive relief.*

NC: *Presumably suit for inj. relief (stat. not explicit).*

TEX: *Referral to the enforcement division of the TNRCC, then to the OAG if necessary.*

UT: *Civil suit.*

WA: *Civil suit, we assume.*

d. Are there any other limitations on enforcement (e.g., limits on the term of the restriction)?

CAL: *No, if done in accord w/ Civil Code §1471.*

COL: *Caselaw does not indicate that there are.*

NC: *No.*

TEX: *We are not aware of any limitations on the enforcement of these particular deed restrictions. It is unknown whether perpetuities would present a problem. So far there have been no challenges.*

UT: *Unknown*

Administrative Orders

- **Most states have authority to issue**
- **Generally do not “run with the land”**
- **May have other limitations**

9

QUESTION # 17. ADMINISTRATIVE ORDERS

a. Do your state administrative agencies have the authority to issue injunctive-type administrative orders in environmental cases?

CAL: *Yes. Health & Safety Code §25202.5(a)(2), Health & Safety Code §§25229, 25230.*

COL: *Yes.*

NC: *Yes.*

TEX: *Yes.*

UT: *Limited.*

WA: *Yes.*

b. Can your agencies issue orders that will "run with the land" – i.e., that will be effective against subsequent owners of the property?

CAL: *Yes. Health and Safety Code §§ 25202.5(b), 25230.*

COL: *This is not clear. If the proper jurisdictional requirements exist, the agency can certainly issue new orders against succeeding owners.*

NC: *No.*

TEX: *It is unclear if we have the ability to issue such orders. We have not so far.*

UT: *Probably not.*

WA: *?*

c. Are there any other limitations on your agencies' ability to issue necessary orders to protect human health and the environment from residual contamination after a cleanup? If so, please describe and give examples:

CAL: *None we are aware of.*

NC: *No.*

TEX: *Yes. The innocent owner/operator statute in Texas would preclude us from pursuing those persons who own or operate property which has become contaminated as a result of a release or migration of contaminants from a source or sources not located on or at their property, and which contamination they did not cause or contribute to. See, Tex. Health and Safety Code, § 361.751 et seq.*

UT: *Too broad a question – sorry.*

Court Injunctions

- Effective against named parties
- Generally do not “run with the land”
- Difficult to cover technical requirements
- May adopt agency order
- Limited experience

10

QUESTION # 18. COURT INJUNCTIONS:

Do you have any experience with using court orders – either alone or in conjunction with administrative orders, deed notices or restrictions, or other legal mechanisms – to protect human health and the environment from residual contamination after a cleanup? If so, please describe the pluses and minuses of this approach.

CAL: *No.*

COL: *The main problem with this, or any other approach available in Colorado, is uncertainty as to whether the control will bind subsequent owners.*

NC: *No.*

TEX: *Yes. Generally, the court order simply reduces an agency order to judgment. Cleanup plans and post-closure care orders are highly technical and are best left to the state agencies.*

UT: *No.*

Environmental Easements

- Effective against parties in privity; “run with the land”
- May not be useful to other parties (or state?)
- Hazardous Substance Easements
- Uniform Conservation Easement Act
 - Not adopted by all states
 - Effectiveness against residual contamination unclear
- Little experience

11

QUESTION # 19. ENVIRONMENTAL EASEMENTS

a. Has your state adopted (in whole or in part) the Uniform Conservation Easement Act?

CAL: *No.*

COL: *We have a statutory conservation easement. I don't know if it is the uniform law or not. It is codified at § 38-30.5-101, C.R.S. (1998).*

NC: *Yes.*

TEX: *Yes. See, Texas Natural Resources Code, §183.001 et seq.*

UT: *No.*

WA: *No.*

b. Does your state have any other law (statute or common law) allowing for the creation of any type of environmental easement? Please describe:

CAL: *Civil Code §1471 and specific Health & Safety Code sections available to DTSC.*

COL: *No.*

NC: *See note above #1. (Throughout, I shall treat covenants & easements as identical, what we'll actually be using is an new statutory device along these lines called a Land Use Restriction (see NCGS 130A-310.3(f)).*

TEX: *Not at this time.*

UT: *We have a conservation easement, but not useful for residual contamination.*

c. Do you have any experience with the use of conservation easements, hazardous substance easements, or any other type of environmental easement to protect human health and the environment from residual contamination after a cleanup? If so, please describe the pluses and minuses of this approach and cite to any authority. If not, please say whether you think this approach would be feasible in your state.

CAL: *See above.*

COL: *We believe the adoption of a hazardous substance easement approach would be feasible in our state, although it has not yet been proposed to the Legislature.*

NC: *No. Would be feasible, treating such an easement as analogous to our new statutory Land Use Restriction (see note above #1) & assuming judicial interpretation will agree the statue trumps the common law obstacles. (See #2*) (Assumes stat. eff. 10/1/97 will be judicially interpreted as authorizing enforcement (NCGS 130A-310.3(f))*

TEX: *We currently have no direct experience with the use of conservation easements. It is unclear how applicable or powerful these easements would be in Texas at this time. See, Texas Natural Resources Code, §183.001 et seq.*

UT: *Have done them, but not enforced.*

Zoning

- **Depends on local cooperation; State has no control**
- **May be a lack of local enforcement**
- **Little experience**

12

QUESTION # 20. LOCAL ZONING ORDINANCES

a. Is it feasible in your state to use zoning to help protect human health and the environment from residual contamination at closed sites (for example, by restricting a site to industrial as opposed to residential uses)? Please say why or why not.

CAL: *It is generally feasible. However, DTSC has no influence over the creation, duration or enforcement of zoning restrictions. It would not be feasible to rely on local zoning ordinances alone to protect the remedy.*

COL: *It is feasible to use zoning to help ensure use restrictions as part of institutional controls, but zoning alone is not sufficient to guarantee protection of human health. Zoning decisions are made by the local government, which does not have the same expertise, authority or mandate to protect human health or the environment as the environmental regulatory agency. Instead, local governments base their zoning decisions on a completely different set of considerations, including economic development impacts, tax consequences, compatibility with surrounding land uses, community desires regarding pace and direction of growth, etc. In my opinion, the agency that imposes the institutional control as part of a cleanup decision must be the only entity with authority to enforce, modify, or terminate an institutional control. Another impediment to using zoning as an institutional control is that zoning restrictions are usually fairly general in nature, while use restrictions as part of a remedy may need to be quite specific (e.g., no excavation below 10' below grade).*

NC: *Sure, if locality's agreeable & state govt. doesn't mind using tool over which it has no control!*

TEX: *Arguably yes. It would be feasible for us to use zoning effectively if we had the authority to ensure the maintenance and integrity of that zoning.*

UT: *Yes, but requires good local cooperation.*

Zoning

Notes, continued.

13

QUESTION # 20. LOCAL ZONING ORDINANCES, cont.

b. Have you experienced any problems with coordination between state and local authorities in the use of zoning for these purposes? Please describe:

CAL: *At Ford Ord, development of the City of Marina's grading ordinance was influenced by the private developer who was waiting to acquire and develop the property.*

COL: *In some cases, local governments have been reluctant to allow state influence or control over land use decisions.*

NC: *No experience w/it yet.*

TEX: *No, but it really hasn't been an issue. Our experience may change with the anticipated adoption of the Texas Risk Reduction Program which might permit the use of zoning as part of an environmental remedy in certain instances.*

UT: *Yes – often doesn't work – no local enforcement.*

c. If zoning were used for protection of human health and the environment from residual contamination at a site, are there sufficient guarantees that the zoning could not be changed without due regard for the effect on such protection?

CAL: *No. All DTSC could get was notification by the City of Marina if/when it proposed to modify or repeal the ordinance.*

COL: *Not in my opinion. See above.*

NC: *No.*

TEX: *No. See "a" above.*

UT: *No.*

Land Use Ordinances

- Similar to Zoning

14

QUESTION # 21. LOCAL LAND USE ORDINANCES

a. Is it feasible in your state to use local land use ordinances to help protect human health and the environment from residual contamination at closed sites? Please say why or why not.

COL: *This would be difficult, because there is no mechanism for notifying the state of issuance of local building permits. Additionally, see previous question for answers to 21 a-c.*

NC: *See answers to preceding Q.*

TEX: *Unknown at this time.*

UT: *Not sure what the difference is between this and zoning, so can't answer.*

b. Have you experienced any problems with coordination between state and local authorities in the use of local ordinances for these purposes? Please describe.

NC: *See answers to preceding Q.*

TEX: *No experience.*

c. If local ordinances were used for protection of human health and the environment from residual contamination at a site, are there sufficient guarantees that the ordinances could not be waived or changed without due regard for the effect on such protection?

NC: *See answers to preceding Q.*

TEX: *Probably not.*

CAL: *Note: In Calif, zoning is a kind of land use ordinance. Same answers as for #20.*

Building Permits

- Similar to answers on Zoning
- One state uses Building Permits to ensure protection of remedies

15

QUESTION # 22. BUILDING PERMITS

a. Is it feasible in your state to use building permits to help protect human health and the environment from residual contamination at closed sites? Please say why or why not.

CAL: *It's legally possible, but probably not a good idea. Each local government could have its own standards, and there would not be consistency in interpretation, enforcement or ultimate abandonment/modification of the permit. Additionally, it is probably more difficult to use building permits and seems more likely to raise "taking" issues.*

COL: *See question 20 for answers to questions 22a-c*

NC: *See answers to #20.*

TEX: *Doubtful.*

UT: *Yes, in limited circumstances. Must be related to building, e.g. use of incomp. materials, cap protected.*

b. Have you experienced any problems with coordination between state and local authorities in the use of building permits for these purposes? Please describe.

CAL: *n/a*

NC: *See answers to #20.*

TEX: *No experience.*

UT: *Not in use enough to test.*

c. If building permits were used for protection of human health and the environment from residual contamination at a site, are there sufficient guarantees that the permits could not be changed without due regard for the effect on such protection?

CAL: *n/a*

NC: *See answers to # 20.*

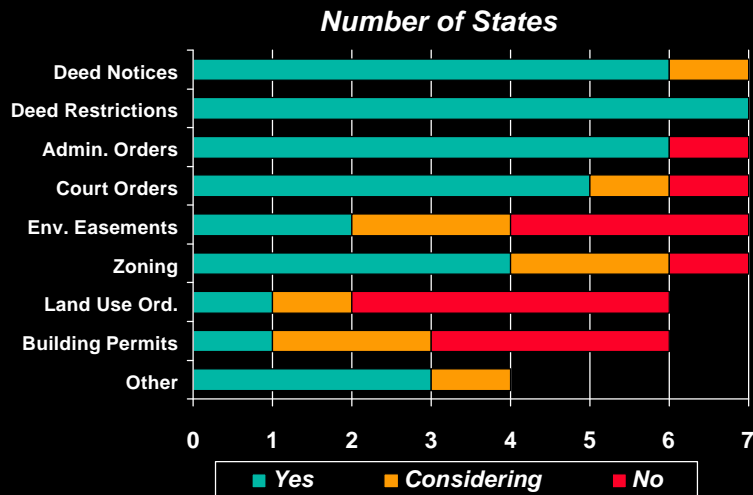
TEX: *Probably not.*

UT: *No.*

DERTF/Feb 99

COMPARATIVE STATE EXPERIENCE

IC's Used in Environmental Remedies



17

QUESTION # 1: Does your state use, or is it considering the use of, any of the following IC's as a part of environmental remedies?

	Y	CONSIDERING	N
Notices in real property records	6	1	
Deed restrictions (restrictive covenants)	7		
Administrative orders by state agencies	6		1

TEX: The difficulty with Administrative Orders is that they are only issued against individuals. Because they don't run with the land, enforcement against subsequent owners may not be possible.

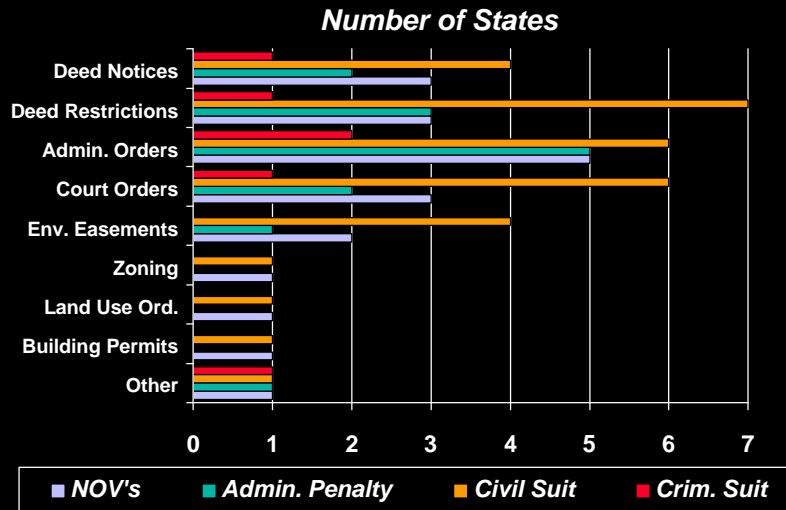
Court orders	5	1	1
--------------	---	---	---

TEX: The difficulty with Court Orders is that they are only issued against individuals. Because they don't run with the land, enforcement of these orders against subsequent land owners may not be possible. Also, although the authority exists in Texas to use court orders as part of environmental remedies, we are unaware at this time of any that have actually been issued.

Environmental easements (such as hazardous substance easements or conservation easements)	2	2	3
Local Zoning Ordinances	4	2	1
Local Use Ordinances	1	1	4
Local Building Permits	1	2	3
Other	1		
COL: Easements	1		
NC: State Permits	1		
TEX: Registry of Closed Sites		1	

CAL: Note: The California Department of Toxic Substances Control (DTSC) has statutory authority, but does not seem to use it, for admin. or court orders. In consultation w/ local government, DTSC could use local zoning ordinances, local use ordinances and local building permits.

Means of Enforcing IC's



18

QUESTION # 10. Which of these means is available to enforce IC's in your state? Are there others?

	<u>NOTICES OF VIOLATION</u>	<u>ADMIN. PENALTIES</u>	<u>CIVIL SUITS</u>	<u>CRIMINAL SUITS</u>
Notices in real property records	3	2	4	1
NC: (Admin. Penalties) There's an ambiguous statute that may allow it.				
(Civil Suits) Against Rps for cost recovery				
Deed restrictions (restrictive covenants)	3	3	7	1
NC: (Admin. Penalties) There's an ambiguous statute that may allow it.				
Administrative orders by state agencies	5	5	6	2
NC: (Admin. Penalties) if stip included in order.				
Court orders	3	2	6	1
NC: (Admin. Penalties) if stip included in order.				
(Civil Suits) presumably ct. order containing IC could be enforceable by its own terms.				
Environmental easements	2	1	4	
Local Zoning Ordinances	1		1	
NC: Not by state				
Local Use Ordinances	1		1	
NC: Not by state				
Local Building Permits	1		1	
NC: Not by state				
Other: NC: St. permits	1	1	1	1
(Notices of Violation) presumably - that's the mere threat of enforcement.				
(Criminal Suits) but suit could only be brought by local DA.				
TEX: Proposed Registry of Closed Sites				

CAL: Note: DTSC does not have knowledge about the availability of remedies to enforce the 3 kinds of local ICs.

Authority to Enforce IC's

	<u>Enforced by</u>	<u>Authority</u>
Deed Notices	State Agency	
Deed Restrictions	St. Agcy; Landowner	
Admin. Orders	State Agency	
Court Orders	State Agcy; Court	
Env. Easements	State Agcy; Seller	
Zoning	Local Gov't	
Land Use Ord.	"	
Building Permits	"	
Other	Other	

19



Clear



Unclear



None

QUESTION # 11. Who has authority to enforce IC's in your state? (Please say if that authority is unclear or uncertain.)

<u>AGENCY</u>	<u>CLEAR</u>	<u>UNCL</u>	<u>NONE</u>
Notices in real property records	2	1	1
CAL: DTSC, through the RAP/ROD			
TEX: TNRCC/OAG			
Deed restrictions (restrictive covenants)	3	2	
CAL: DTSC			
TEX: TNRCC/OAG			
WA: We assume the Dept. of Ecology, but no experience yet.			
Administrative orders by state agencies	5		
CAL: DTSC			
COL: State may enforce against person to whom order is issued			
TEX: TNRCC/OAG			
WA: Dept. of Ecology (through AGO)			
Court orders	5		
CAL: DTSC			
COL: State may enforce against party to order			
TEX: TNRCC/OAG			
WA: Dept. of Ecology (through AGO)			
Environmental easements	1		2
Local Zoning Ordinances	4		
COL: Local government			
TEX: Local Gov't/City Attorney			
UT: Local municipality			

(cont.)

Authority to Enforce IC's

Notes, continued.

20

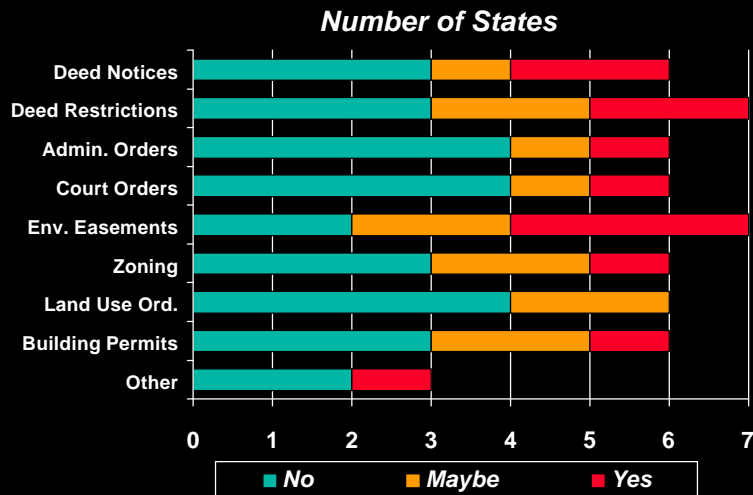
QUESTION # 11, cont.

<u>AGENCY</u>		<u>CLEAR</u>	<u>UNCL</u>	<u>NONE</u>
Local Use Ordinances		3	1	
COL:	<i>Local government</i>			
TEX:	<i>Local Gov't/City Attorney</i>			
UT:	<i>Local municipality</i>			
Local Building Permits		3	1	
COL:	<i>Local government</i>			
TEX:	<i>Local Gov't/City Attorney</i>			
UT:	<i>Local municipality</i>			
Other	TEX: <i>Proposed Registry of Closed Sites</i>	1		

CAL: DTSC can enforce only those ICs as to which it was the beneficiary.

NC: All enforcement authority cited in response to Q 10 belongs to state except where noted (then it would be local, if it exists at all).

Limitations on Legal Enforceability



21

QUESTION # 2: Are you aware of any limitations on the legal enforceability of these IC's? If so, please say what the limitations are and cite to any relevant statutes or reported cases:

	<u>Y</u>	<u>Maybe</u>	<u>N</u>
Notices in real property records	1	1	3

COL: The requirement to insert the notice in the property records can be enforceable, but by its nature, the notice is not an enforceable requirement.

TEX: Deed notices in Texas serve only to put the public on notice and do not really provide any enforceable rights. Deed notices must meet certain content requirements before the state will approve a site closure. Closure violations are redressable as violations of orders, permits, and rules, but are not violations of a deed notice.

Deed restrictions (restrictive covenants)	2	2	2
--	----------	----------	----------

COL: No Colorado caselaw on equitable servitudes, and caselaw on covenants suggests that privity (of a type the regulatory agency is unlikely to have) is necessary for a covenant to run with the land.

NC: Assumes stat eff. 10/1/97 will be judicially interpreted as authorizing enforcement (NCGS 130A-310.3(f)).

TEX: Deed restrictions in Texas are being used on a voluntary basis in the State-Lead Superfund, State Superfund, and Voluntary Cleanup Programs. Although these deed restrictions have not yet been tested in a court of law, they are believed by some lawyers to be enforceable under the environmental enforcement laws of the State, as well as under general theories of contract law. There are some attorneys who question this. Deed restrictions are not currently being used at RCRA facilities in Texas.

Injunctive orders by state agencies	1	1	3
--	----------	----------	----------

COL: Questionable whether these would apply to successive owners/operators. No caselaw on point.

TEX: We are not aware of any limitations on the enforceability of these orders against named individuals; however, because they do not run with the land enforcement against future owners may be difficult.

Court orders	1	1	3
---------------------	----------	----------	----------

COL: Same as administrative orders.

TEX: We are not aware of any limitations on the enforceability of these orders against named individuals; however, because they do not run with the land enforcement against future owners may be difficult.

Limitations on Legal Enforceability

Notes, continued.

22

QUESTION # 2, cont:

	<u>Y</u>	<u>M</u>	<u>N</u>
Environmental easements	3	2	1
COL: I assume you mean statutory easements. We do not have a hazardous substance easement in Colorado, and the purposes for which one may establish a statutory conservation easement do not encompass protecting human health from residual contamination as part of a remedy. Easements (common law) -- No caselaw in Colorado that says negative easements in gross are permissible. Also, an easement is an interest in property, and it's not clear whether the state environmental agency can hold property in the relevant circumstances.			
NC: Assumes stat eff. 10/1/97 will be judicially interpreted as authorizing enforcement (NCGS 130A-310.3(f)).			
TEX: Texas does not currently have authority to create such easements.			
Local Zoning Ordinances	1	2	2
COL: All of the local government controls have a fundamental flaw: they are not in the control of the environmental agency. Therefore, I consider them not enforceable.			
TEX: It is unclear whether the State of Texas has jurisdiction to enforce.			
Local Use Ordinances	0	2	3
TEX: It is unclear whether the State of Texas has jurisdiction to enforce.			
Local Building Permits	1	2	2
TEX: It is unclear whether the State of Texas has jurisdiction to enforce.			
Other: COL: Easements	1	0	0
NC: State permits	0	0	1
TEX: Proposed Registry of Closed Sites	0	0	1
CAL: Note: Calif. Civil Code §1471 sets forth the requirements for an environmental restriction to run w/ the land. No problems w/ enforcing so long as underlying document is in compliance w/ §1471.			
UT: No local cases or statutes - just the well-known problems deriving from the Restatement of Property – privity, etc.			

Public Access to Information on IC's

	<u>Location</u>	<u>Feasibility</u>
<u>Deed Notices</u>	<u>Deed Records</u>	
<u>Deed Restrictions</u>	<u>Deed Records</u>	
<u>Admin. Orders</u>	<u>State Agency</u>	
<u>Court Orders</u>	<u>Court Clerk; AGO</u>	
<u>Env. Easements</u>	<u>Deed Records</u>	
<u>Zoning</u>	<u>City Hall</u>	
<u>Land Use Ord.</u>	<u>City Hall/Courthouse</u>	
<u>Building Permits</u>	<u>City Hall</u>	
<u>Other</u>	<u>Other</u>	
<i>Feasible</i>	<i>Undetermined</i>	<i>Infeasible</i>

23

QUESTION # 12. Where can the public go to find out about IC's applicable to a specific piece of property in your state (e.g., real property records, state registry, etc.)? Are such records compiled and indexed in such a way as to make the search feasible?

	<u>LOCATION</u>	<u>FEASIBLE?</u>		
		<u>Y</u>	<u>N</u>	<u>MAYBE</u>
Notices in real property records		4		1
COL:	<i>County Recorder</i>			
NC:	<i>Register of Deeds office</i>			
TEX:	<i>County Deed Records</i>			
UT:	<i>Recorders</i>			
WA:	<i>Property records</i>			
Deed restrictions (restrictive covenants)		5		1
COL:	<i>County Recorder</i>			
NC:	<i>Register of Deeds office</i>			
TEX:	<i>County Deed Records</i>			
UT:	<i>Recorders</i>			
WA:	<i>Property records</i>			
Administrative orders by state agencies		1	2	2
COL:	<i>State env. agency</i>			
NC:	<i>Applicable state environ agency's files</i>			
TEX:	<i>State Agency *</i> <i>(TNRCC Central Records)</i>			
WA:	<i>Dept. of Ecology</i>			

* TEX: Records at the TNRCC are indexed according to company and owner, not by location. Searching the records is clearly feasible, but not always easy.

Public Access to Information on IC's

Notes, continued.

24

QUESTION # 12, cont.

		<u>FEASIBLE?</u>		
		<u>Y</u>	<u>N</u>	<u>MAYBE</u>
Court orders		2	2	2
COL:	State env. agency or court records			
NC:	Applicable state environ. agency's files + court.			
TEX:	OAG. (Searching for records at the Attorney General's Office is feasible, but not always easy.)			
WA:	Court files			
Environmental easements		2		1
CAL:	DTSC will be maintaining a registry of deed restrictions and easements it had a part in creating and it will be available on the "www".			
NC:	Register of Deeds office			
UT:	Recorders			
Local Zoning Ordinances		2		2
COL:	Local zoning agency			
NC:	Town Hall or County Seat			
UT:	Ordinances			
Local Use Ordinances		2		2
COL:	Local zoning or planning agency			
NC:	Town Hall or County Seat			
UT:	Ordinances			
Local Building Permits		2		2
COL:	Local building department			
NC:	Town Hall or County Seat			
UT:	Ordinances			
Other NC: St. Permits	Applicable state environ. agency's files			
TEX: Proposed Registry of Closed Sites		1		

IC's Used Together

- Admin Orders requiring Deed Restrictions
- Admin Orders requiring Deed Recordation
- Consent Decrees requiring Restrictive Covenants
- Consent Agreements requiring Deed Restrictions
- Court or Administrative Orders requiring Deed Restrictions and, where applicable, Long-Term Operation and Maintenance Agreements
- Restriction & Easements
- Zoning & Restrictions

25

QUESTION # 3.a. Are any of these IC's used, or contemplated to be used, in conjunction with others (e.g., an agency order requiring the site owner to place a notice or deed restriction on the property)? If so, please give examples:

CAL: At the former Fort Ord, a local land use ordinance was enacted and the Army gave notice in the deed transferring a portion of the base of the potential presence of UXO

Under statutory authority (Calif Health & Safety Code §§ 25222.1, 25229, and 25230, DTSC can, upon making certain determinations, order the landowner to sign and record a restrictive covenant.

COL: We are proposing that a consent decree at an NPL site include a requirement that the landowner include a restrictive covenant in the deed if it should transfer the land. We also want to require the landowner to notify us before transferring the land, and that we approve the wording of the deed. Each deed would include the requirement for notifying the state and allowing us to review the wording of subsequent deeds.

NC: Question rephrased: Are any of these IC's used, or contemplated to be used, in conjunction with others (e.g., an agency or court order requiring the site owner to place a notice or deed restriction or easement on the property)? If so, please give examples: or, say, making finalization of AOC dependent on appropriate local measure (ordinance or permit). Example: This very one (an agency or court order requiring the site owner to place a notice or deed restriction easement on the property).

TEX: Yes. Administrative Orders requiring cleanup under the Texas Risk Reduction Rules require deed recordation of closed sites if any contamination is left in place. Also, some recent Agreed Orders under the State-Lead Superfund, State Superfund, and Voluntary Cleanup Programs have contained requirements for deed restrictions in favor of the State of Texas.

UT: We've used deed restrictions as required by consent agreements; restrictions & easements, and zoning & restrictions.

WA: Yes, WA frequently issues orders or enters into consent decrees with responsible parties requiring them to file restrictive covenants.

IC's Used Together

Notes, continued.

26

QUESTION # 3., cont.

b. Are there any problems with the enforceability of these controls used in combination? If so, please give examples.

CAL: *Not aware of any.*

COL: *In the above example, if the landowner does not notify the state of a transfer, we may not be able to enforce a restriction against the transferee.*

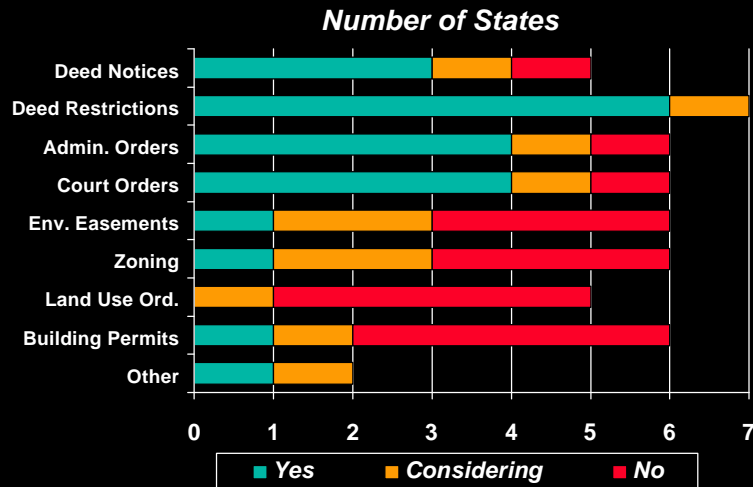
NC: *See Q 2 (Assumes stat. eff. 10/1/97 will be judicially interpreted as authorizing enforcement (NCGS 130A-310.3(f))*

TEX: *Yes. There may be a difficulty in enforcing these orders against future landowners who may not be responsible parties. Also, the use of deed restrictions as a part of environmental remedies has not yet been tested by the courts.*

UT: *Not yet.*

WA: *Not that we have experienced so far.*

IC's Used with Engineering Controls



27

QUESTION # 4: Are these controls used, or are you considering their use, to protect or reinforce engineering controls (e.g., a prohibition against digging into a landfill, or an easement to ensure access to a pump-and-treat system)?

	Y	CONSIDERING	N
Notices in real property records	2	1	1
Deed restrictions (restrictive covenants)	5	2	

CAL: Generally, restrictive covenants will preclude access to contaminated soil or groundwater, or will prohibit uses whose associated human exposure scenarios would be dangerous. For example, a county might agree not to issue well permits in order to prevent spreading groundwater contamination.

Administrative orders by state agencies	4	1	
Court orders	4	1	
Environmental easements	1	2	2
Local Zoning Ordinances	1	2	2

TEX: Although Zoning Ordinances are being considered as an available partial remedy under the proposed Texas Risk Reduction Program, we do not believe that their use would actually protect or reinforce engineering controls.

Local Use Ordinances		1	3
Local Building Permits	1	1	3
Other: NC: State Permits		1	

TEX: Proposed Registry of Closed Sites 1

NC: Question rephrased: Are these controls used, or are you considering their use to protect or reinforce engineering controls (e.g., a prohibition against digging into a landfill or a cap, or an easement to ensure access to a pump-and-treat system)?

IC's Used with Engineering Controls

Notes, continued.

28

QUESTION # 4, con't.:

If you have answered "yes" or "considering" to any of the above, please describe and give examples:

COL: *At the Lowry Landfill (an NPL site), the ROD relies on a combination of restrictive covenants and zoning to protect a landfill cap and other engineered features of the remedy.*

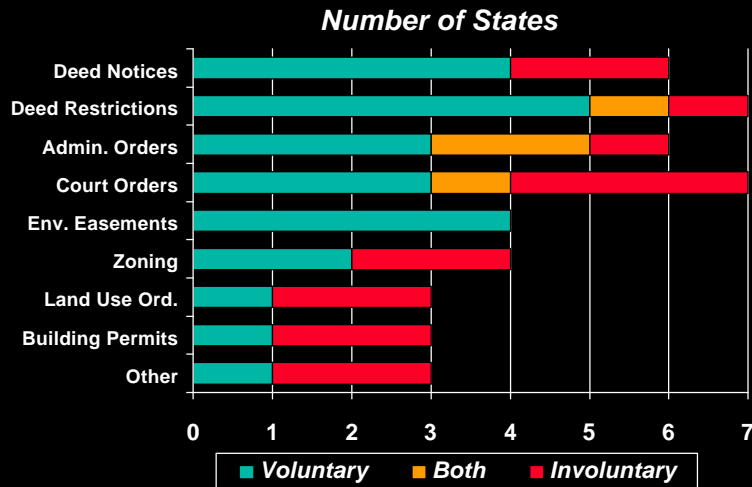
NC: *The very kinds of examples cited above.*

TEX: *Deed Notices under the current Texas Risk Reduction Program are required to describe any engineering controls that are in place. Although the deed notice itself is not enforceable, a failure or violation of an engineering control may be noted by the public as a result of the deed notice, and thus trigger State enforcement of the relevant underlying order or permit. Deed restrictions, if violated, should be brought to the attention of the State. Administrative and Court Orders should contain requirements with respect to engineering controls, and are enforceable administratively, civilly, and possibly criminally. The proposed registry of closed sites may contain trackable information regarding engineering controls, and would act as a trigger to enforcement, similar to deed notices, where there was a violation.*

UT: *Yes - to protect caps. Building permit reqts used to prevent incompat. bldg. materials.*

WA: *We use these devices (e.g., restrictive covenants) to prohibit actions that would interfere with a cleanup remedy, such as digging through a LF cover, and to require proper operation + maintenance of.*

IC's Voluntary/Involuntary



29

**QUESTION # 5. Is the use of these controls voluntary or involuntary on the part of landowners?
If involuntary, what is your legal authority for requiring this control?**

	<u>V</u>	<u>B</u>	<u>I</u>	<u>AUTHORITY</u>
Notices in real property records	4		2	
NC:				<i>NCGS 130A-310.8</i>
WA:				<i>RCW 70.105D.030(1)(f)</i>
Deed restrictions (restrictive covenants)	5	1	1	
CAL:				<i>V/I: H&S §25205.5; V: 25222.1; I: 25229/25230</i>
NC:				<i>NCGS 130A-310.3(f)</i>
WA:				<i>RCW 70.105D.030(1)(f)</i>
Administrative orders by state agencies	3	2	1	
NC:				<i>NCGS 130A-310.9; Several sections of state Superfund law</i>
TEX:				<i>Tex. Water Code, §26.019</i>
WA:				<i>RCW 70.105D.050(1)</i>
Court orders	3	1	3	
CAL:				<i>H&S §25229/25230</i>
NC:				<i>Depends whether there's victory by state or settlement Enforcement provisions of state Sup. law & CERCLA cost recovery w/pendent public nuisance claim</i>
WA:				<i>RCW 70.105D.040(4).</i>

IC's Voluntary/Involuntary

Notes, continued.

30

QUESTION # 5, cont.

	<u>V</u>	<u>B</u>	<u>I</u>	<u>AUTHORITY</u>
Environmental easements	4			
NC:				130A-310.3(f)
Local Zoning Ordinances	2		2	
CAL:				Local authority
NC: <i>Doesn't fit Q</i>				
WA:				local authority
Local Use Ordinances	1		2	
CAL:				Local authority
NC: <i>Doesn't fit Q</i>				
WA:				local authority
Local Building Permits	1		2	
CAL:				Local authority
NC: <i>Doesn't fit Q</i>				
WA:				local authority
Other			1	
NC: <i>state permits</i>			1	permitting authorities
TEX: <i>Proposed Registry of</i>				
<i>Closed Sites</i>	1			
WA:				RCW 70.105D.030(1)(g)

COL: Typically, these controls are negotiated as part of a remedy. Because the landowner often is also the PRP, they are generally willing to agree to the control in exchange for having to do less cleanup. I am not aware of any situation in which we have forced a party to accept use restrictions as part of a remedy.

UT: All voluntary – no authority except authority to deny approval, to settle, to deny a transfer, etc.

Long-Term Monitoring & Enforcement

	<u>Agency</u>	<u>Adequacy</u>	<u>Reason</u>
<u>Deed Notices</u>	State Agcy		\$ & staff
<u>Deed Restrictions</u>	Resp. Party		“
<u>Admin. Orders</u>	State/EPA		“
<u>Court Orders</u>	“		“
<u>Env. Easements</u>	Resp. Party		“
<u>Zoning</u>	Local Gov't		“
<u>Land Use Ord.</u>	“		“
<u>Building Permits</u>	“		“
<u>Other</u>	State Agcy		“
	Adequate	Undetermined	Inadequate

31

QUESTION # 6. What agency, if any, is responsible for long-term monitoring of compliance with, and enforcement of, these controls? Are provisions adequate for such measures?

	<u>RESPONSIBILITY</u>	<u>ADE- QUATE</u>	<u>UNDE- TERM.</u>	<u>INADE- QUATE</u>
Notices in real property records	St. Agency - DEQ - TNRCC/OAG - DTSC	2	3	1
Deed restrictions (restrictive covenants)	Resp. Party - DEQ TNRCC/OAG - DTSC	2	3	1
Administrative orders by state agencies	St. Agency - DEQ TNRCC/OAG	2	3	1
Court orders	St. Agenc. -DEQ TNRCC/OAG - DTSC	3	2	1
Environmental easements	Resp. Party		3	
Local Zoning Ordinances	Locality		5	1
Local Use Ordinances	Locality		5	
Local Building Permits	Locality		5	
Other St. Permits	St. Agency		2	
TEX: Proposed Registry of Closed Sites	TNRCC	1		

COL: The Hazardous Materials and Waste Management Division in the Department of Public Health and Environment is responsible. Currently, they do not have a program in place to monitor compliance with institutional controls, but they recognize this is an emerging issue.

Long-Term Monitoring & Enforcement

Notes, continued.

32

QUESTION # 6, CONT.

NC: Deed Restrictions: RP who imposes or obtains covenant - responsibility is for enforcement (no explicit monitoring responsibility); state & local govt. also authorized to enforce.

TEX: The ability to research and locate restrictions and engineering controls may be problematic depending on how such a data base is set up. For instance, what information would the public need in order to access the data base? Address? Permit numbers? Names of owner/operators? GPS information? Would maps be used?

UT: Dept. of Env. Quality oversees property owner's responsibility for compliance.

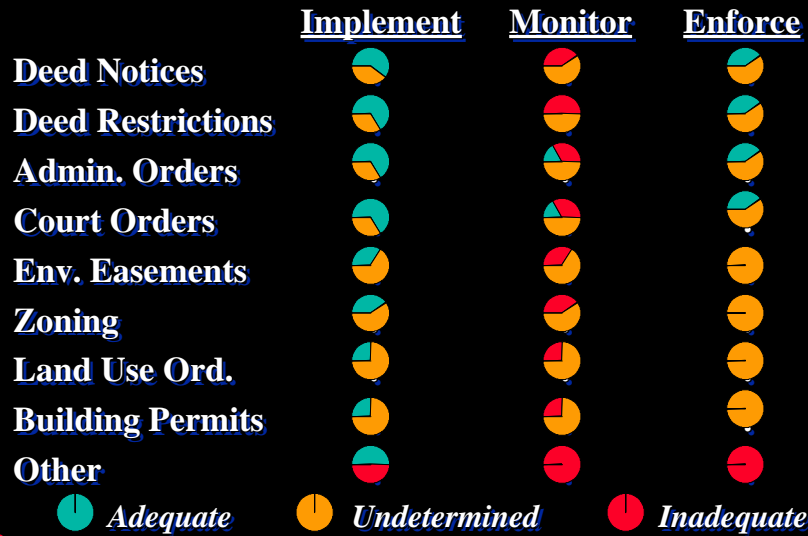
If you indicated that provisions are not adequate, please explain why not:

NC: Probable lack of \$ and staff.

TEX: We do not currently have a mechanism for tracking deed notices, and/or deed restrictions. With respect to deed notices, all that is required is proof of filing.

UT: We have not had to enforce yet.

Adequacy of Funding for IC's



33

QUESTION # 7. Is funding adequate to implement, monitor compliance with, and enforce IC's in your state?

	<u>IMPLEMENT</u>			<u>MONITOR</u>			<u>ENFORCE</u>		
	<u>Y</u>	<u>N</u>	<u>U</u>	<u>Y</u>	<u>N</u>	<u>U</u>	<u>Y</u>	<u>N</u>	<u>U</u>
Notices in real property records	3		2	3	2		2		3
Deed restrictions (restrictive covenants)	4		2	3	3		2		3
Administrative orders by state agencies	4		2	1	2	3	2		3
Court orders	4		2	1	2	3	2		3
Environmental easements	1		2	1	2				3
Local Zoning Ordinances	2		3	2	3				4
Local Use Ordinances	1		3	1	3				4
Local Building Permits	1		3	1	3				4
Other NC: State Permits	1			1					
TEX: Proposed Registry of			1		1				1
Closed Sites									

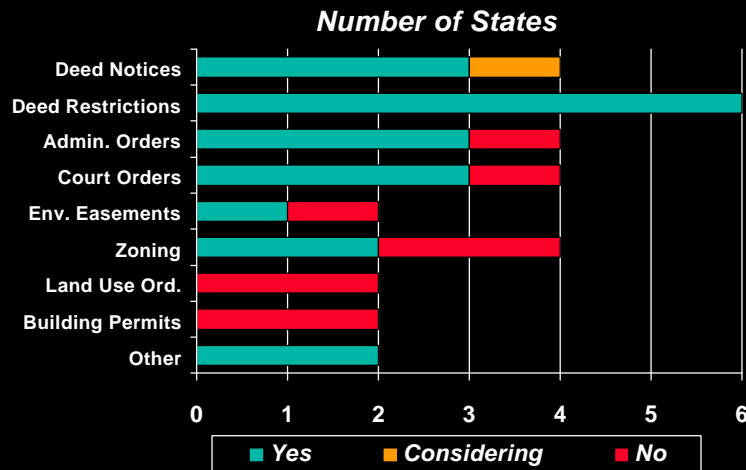
CAL: When DTSC is aware of violations of institutional controls, it would direct funds for enforcement. However, no money is currently directed to monitoring. Funding for monitoring might result in more monitoring.

COL: Funding is probably adequate in the short term, but as noted above, there is no program in place to monitor institutional controls in the long run.

TEX: Funding is not sufficient to monitor deed notices and deed restrictions primarily because there is no mechanism in place to track them. Similarly, since the Proposed Registry is still in the conceptual stage of development it is not part of the budget and therefore there is no funding for implementation, monitoring, or enforcement.

UT: Question is too simple – it's a matter of priorities. However, funding is rarely specifically provided.

Using IC's to Set Cleanup Levels



34

QUESTION # 8. Does your state use, or is it considering using, assumed land use restrictions as a basis for setting cleanup levels (e.g., allowing higher levels of residual contamination on industrial property than on residential)?

	Y	CONSIDERING	N
Notices in real property records	3	1	
Deed restrictions (restrictive covenants)	6		
Administrative orders by state agencies	3		1
Court orders	3		1
Environmental easements	1		1
Local Zoning Ordinances	2		2
Local Use Ordinances			2
Local Building Permits			2
Other	1		
TEX: Proposed Registry of Closed Sites	1		

CAL: At this time, DTSC is aware that the military facilities are putting notices of institutional controls in their deeds. Don't know whether it's being done by private site owners.

COL: Yes. This is explicit in our voluntary cleanup program, which is found at § 25-16-301, C.R.S. In other programs (RCRA, CERCLA), future land use is generally considered in establishing cleanup levels, even before any institutional control is in place.

NC: Yes (but willy nilly). CONSIDERING (uniform protocol). These categories don't make sense for this question. Also, if a state says it's using IC's but isn't allowing risk-based cleanups, there's something strange (unless its only use of ICs is to protect engineered controls.)

Effectiveness of IC's in Setting Cleanup Levels

- Cleanup levels may be based on assumptions about future land use
- IC's may be required to enforce land use
- Inadequate experience in most states to judge effectiveness

35

QUESTION # 9: Do you have any experience with the effectiveness of such use restrictions in setting cleanup levels? Was that experience positive or negative? Include such factors as: (1) technical feasibility of calculating contaminant levels based upon assumed future use in a risk-based cleanup, (2) cost savings, (3) enforceability of use restrictions, and (4) alternatives if the remedy fails.

CAL: It's been a keystone of California clean-ups for some time to allow cleanups to leave contamination in place and couple it with land use restrictions.

COL: We have had difficulty in setting appropriate exposure limits because of a lack of data regarding land uses other than residential use. Data quality is still not adequate, though it is improving. I don't think we generally analyze cost savings. We have not yet encountered situations where the enforceability of the use restriction has been challenged, nor have we encountered remedy failure.

NC: Too soon, but I'm skeptical. You don't use the restrictions to set the levels; you use them to protect those levels (more properly to prevent exposure in excess of the assumptions on which the levels are based).

TEX: Yes. The current and proposed risk rules allow different cleanup levels based on assumptions of future land use. See, Title 30 Tex. Admin. Code, §335.551 et seq.

UT: Inadequate experience yet to judge.

WA: WA has separate cleanup levels for industrial sites. Our rules require that restrictive covenants be filed for sites cleaned up to these levels.

IC's at NPL / Non-NPL Sites

- EPA has to be party to IC negotiations at NPL sites.
- Few other differences in IC's at NPL sites versus non-NPL sites.

36

QUESTION # 13. Are there any differences in IC's useable at NPL sites versus non-NPL sites in your state? Please describe.

CAL: *EPA has to be a party to the IC negotiations at NPL sites.*

COL: *At NPL sites, CERCLA administrative orders would be available to enforce against the PRP, and there would generally be a federal consent decree. Typically, these orders or decrees require use of covenants, easements, deed notices, and/or zoning as the institutional control. Our voluntary cleanup law does not provide for any enforceable institutional control.*

NC: *Nope.*

TEX: *There are no apparent differences between NPL and non-NPL sites in Texas. However, please note that deed restrictions in Texas have so far only been used at state-lead NPL, state Superfund, and Voluntary Cleanup Program sites. Deed restrictions have not, by contrast, been utilized at RCRA facilities in Texas.*

UT: *No.*

WA: *No.*

Takings

- **IC's do not constitute compensable takings because they are voluntary.**

37

QUESTION # 14. Does the requirement for IC's constitute a compensable taking? Please cite to any authority.

CAL: *No, since it's voluntary. With respect to involuntary ICs, it's never been tested.*

COL: *Under normal circumstances, it would not be a taking. State v. The Mill, 887 P.2d 993 (Colo. 1994) (no property right to maintain property in a manner that constitutes a nuisance, even if that prevents all economic use of property).*

NC: *First, there is no "requirement" for ICs. It's what RPS get if they make a convincing case. (They can't even be used where the owner's not the "agreeing" RP without owner's consent, which may involve the RP compensating the owner.) Thus, given their consensual nature, there would be no taking.*

TEX: *Probably not. Responsible parties who avail themselves of Texas' risk reduction rules, and choose remedies which require institutional controls (such as engineering controls, deed notices, etc.) do so voluntarily. Because the choice of cleaning up to less than background is voluntary, there is no state action and therefore no taking.*

UT: *No – voluntary only.*

WA: *Not that I am aware of.*

Conclusions

- Limited data
- IC's have problems of enforceability
 - Court & admin orders do not run with the land
 - Deed notices, restrictions, & easements have legal limitations (e.g., privity)
 - Local measures uncertain
- Multiple controls are advisable
- Problems with long-term monitoring

